



8011-01p

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-70284; File No. SR-NYSEArca-2013-83]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Investments in Leveraged Loans by the Peritus High Yield ETF

August 29, 2013.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on August 21, 2013, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to reflect a change to the holdings of the Peritus High Yield ETF to achieve its investment objective to include leveraged loans. Peritus High Yield ETF is currently listed and traded on the Exchange under NYSE Arca Equities Rule 8.600. The text of the proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commission has approved listing and trading of shares ("Shares") of the Peritus High Yield ETF ("Fund") on the Exchange under NYSE Arca Equities Rule 8.600⁴ ("Managed Fund Shares").⁵ The Shares are offered by AdvisorShares Trust (the "Trust"), a statutory trust organized under the laws of the State of Delaware and registered with the Commission as an

⁴ See Securities Exchange Act Release No. 63329 (November 17, 2010), 75 FR 71760 (November 24, 2010) (SR-NYSEArca-2010-86) ("Prior Order"). The notice of filing of SR-NYSEArca-2010-86 was published in Securities Exchange Act Release No. 63041 (October 5, 2010), 75 FR 62905 (October 13, 2010) ("First Prior Notice"). In addition, the exchange filed a proposed rule change to reflect a change to the Fund's holdings to achieve its investment objective to include equity securities. See Securities Exchange Act Release No. 66818 (April 17, 2012), 77 FR 24233 (April 23, 2012) (SR-NYSEArca-2012-33) (notice of filing and immediate effectiveness of proposed rule change ("Second Prior Notice" and, together with the First Prior Notice and the Prior Order, the "Prior Release")). The Fund and the Shares are currently in compliance with the listing standards and other rules of the Exchange and the requirements set forth in the Prior Release.

⁵ A Managed Fund Share is a security that represents an interest in an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) ("1940 Act") organized as an open-end investment company or similar entity that invests in a portfolio of securities selected by its investment advisor consistent with its investment objectives and policies. In contrast, an open-end investment company that issues Investment Company Units, listed and traded on the Exchange under NYSE Arca Equities Rule 5.2(j)(3), seeks to provide investment results that correspond generally to the price and yield performance of a specific foreign or domestic stock index, fixed income securities index or combination thereof.

open-end management investment company.⁶ Peritus High Yield ETF is currently listed and traded on the Exchange under NYSE Arca Equities Rule 8.600.

The investment adviser to the Fund is AdvisorShares Investments, LLC (the “Adviser”). Peritus I Asset Management, LLC is the Fund’s sub-adviser (“Peritus” or the “Sub-Adviser”).

According to the Registration Statement and as stated in the Prior Release, the Fund’s investment objective is to achieve high current income with a secondary goal of capital appreciation. The Exchange proposes to reflect a change to the holdings of the Fund to achieve its investment objective to include up to 20% of its net assets in “leveraged loans”, in addition to the other permitted investments set forth in the Prior Release.⁷ The Adviser represents that the investment objective of the Fund will not be changing.

Leveraged loans will include loans referred to as senior loans, bank loans and/or floating rate loans. The Fund will invest in such leveraged loans that the Adviser or Sub-Adviser deems to be highly liquid with readily available prices. The Fund will invest in leveraged loans rated C or higher by a credit rating agency registered as a nationally recognized statistical rating organization (“NRSRO”) with the Commission (for example, Moody’s Investors Service, Inc.), or is unrated but considered to be of comparable quality by the Adviser or Sub-Adviser.⁸ The

⁶ The Trust is registered under the 1940 Act. On October 29, 2012, the Trust filed with the Commission an amendment to its registration statement on Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a) and the 1940 Act relating to the Fund (File Nos. 333-157876 and 811-22110) (the “Registration Statement”). The description of the operation of the Trust and the Fund herein is based, in part, on the Registration Statement. In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 29291 (May 28, 2010) (File No. 812-13677).

⁷ The change to the Fund’s holdings to include leveraged loans will be effective upon filing with the Commission of an amendment to the Trust’s Registration Statement and upon the effectiveness and operativeness of this proposal.

⁸ In determining whether a security is of “comparable quality,” the Adviser or Sub-Adviser will consider, for example, whether the borrower of the security has issued other rated

Fund will not invest in leveraged loans that are in default at time of purchase. The Fund will only invest in U.S. dollar-denominated leveraged loans. In addition, for investment purposes, the leveraged loan must have a par amount outstanding of U.S. \$150 million or greater at the time the loan is originally issued.⁹

Leveraged loans are borrowings by non-investment grade companies (i.e., loans rated below Ba1 by Moody's Investor Service and BBB+ by Standard & Poor's or are non-rated). The word "leveraged" refers to the credit quality of the borrower—a non-investment grade company—not to any sort of use of leverage or margin within the loan structure. These are debt obligations that are structured between the borrower and the lender or lender group. The terms of the loan are negotiated up front and defined in the credit agreement. Just as high yield bonds have indentures that govern the terms of the debt obligation, leveraged loans have credit agreements that specify the terms, including maturity, prepayment obligations, financial covenants, and security. The terms of the loan can be restructured throughout the life of the loan via an amendment process that requires a certain percentage of holder approval. Once issued, various pieces of the loan often trade in an active secondary market.

The four basic features of leveraged loans are as follows:

securities; whether the obligations under the security are guaranteed by another entity and the rating of such guarantor (if any); whether and (if applicable) how the security is collateralized; other forms of credit enhancement (if any); the security's maturity date; liquidity features (if any); relevant cash flow(s); valuation features; other structural analysis; macroeconomic analysis; and sector or industry analysis.

⁹ The Commission previously has approved listing and trading on NYSE Arca of an issue of Managed Fund Shares that primarily holds senior loans that include leveraged loans. See Securities Exchange Act Release No. 69244 (March 27, 2013), 78 FR 19766 (April 2, 2013) (SR-NYSEArca-2013-08) (order approving listing and trading of SPDR Blackstone/GSO Senior Loan ETF under NYSE Arca Equities Rule 8.600).

1. Seniority in the Capital Structure: Leveraged loans are generally among the most senior debt obligations in the borrower's capital structures and, as such, would generally have first priority in payment.
2. Security Backing: Leveraged loans are generally secured by the borrower's assets and operations. This usually includes both the physical assets as well as other assets of the company. In the case of a default, the loan holder would have a claim to those assets.
3. Covenant Protection: Pursuant to the credit agreement governing the loan, loan holders are usually protected by a variety of covenants. These covenants can include a maximum leverage test, minimum interest coverage test, a restricted payments basket potentially limiting payments for subordinate obligations and dividends, and/or prepayment criteria. The covenants governing leveraged loans are generally more restrictive than those governing high yield bonds, providing the loan holder with added protections.
4. Floating Rate Interest Payments: These loans generally pay interest with 3 month LIBOR as the base rate. The structure is usually a specified spread over the floating LIBOR rate. However, in some cases a LIBOR floor or ceiling may be specified.

As stated in the Prior Release, the Fund will not invest in options contracts, futures contracts or swap agreements. The Fund's investments will be consistent with its investment objective and will not be used to enhance leverage.

As stated in the Prior Release, on each business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund discloses on its website the

Disclosed Portfolio that will include, among other portfolio components, leveraged loans, and that will form the basis for the Fund's calculation of net asset value ("NAV") at the end of the business day. The intra-day, closing and settlement prices of the portfolio securities, including any leveraged loans held by the Fund, will also be readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, or on-line information services.

In calculating the Fund's NAV per Share, the Fund's investments will generally be valued using market valuations.¹⁰ A market valuation generally means a valuation (i) obtained from an exchange, a pricing service, or a major market maker (or dealer), (ii) based on a price quotation or other equivalent indication of value supplied by an exchange, a pricing service, or a major market maker (or dealer) or (iii) based on amortized cost.¹¹ The Adviser may use various pricing services, or discontinue the use of any pricing service, as approved by the Trust's Board of Trustees from time to time. A price for leveraged loans obtained from a pricing service based on such pricing service's valuation matrix may be considered a market valuation. Valuations with respect to leveraged loans will be based on information supplied by pricing services or major market makers or dealers, as indicated in (i) and (ii) above. Any assets or liabilities denominated in currencies other than the U.S. dollar will be converted into U.S. dollars at the current market rates on the date of valuation as quoted by one or more sources.

In the event that current market valuations are not readily available or such valuations do not reflect current market value, the Trust's procedures require that a security's fair value be

¹⁰ Markit will be the primary price source for leveraged loans in calculating the NAV of the Fund's portfolio.

¹¹ For market valuation purposes, amortized cost will only apply to securities that have a remaining maturity of 60 days or less.

determined if a market price is not readily available.¹² In determining such value the Adviser or Sub-Adviser may consider, among other things, (i) price comparisons among multiple sources, (ii) a review of corporate actions and news events, and (iii) a review of relevant financial indicators (e.g., movement in interest rates, market indices, and prices from the Fund's index providers). In these cases, the Fund's NAV may reflect certain portfolio securities' fair values rather than their market prices. Fair value pricing involves subjective judgments and it is possible that the fair value determination for a security is materially different than the value that could be realized upon the sale of the security.

All representations made in the Prior Release regarding the availability of information relating to the Shares, trading halts, trading rules, the Portfolio Indicative Value, and surveillance, among others, will continue to apply to trading in the Shares.

Except for the changes noted above, all other representations made in the Prior Release remain unchanged.¹³ The Fund will continue to comply with all initial and continued listing requirements under NYSE Arca Equities Rule 8.600.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)¹⁴ that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to,

¹² The Trust's Board of Trustees has established Fair Value Procedures responsible for the valuation and revaluation of any portfolio investments for which market quotations or prices are not readily available. The Fund has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding valuation and revaluation of any portfolio investments.

¹³ See note 4, supra.

¹⁴ 15 U.S.C. 78f(b)(5).

and perfect the mechanism of a free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NYSE Arca Equities Rule 8.600. The Fund may invest up to 20% of its net assets in leveraged loans, in addition to the other permitted investments set forth in the Prior Release. The Fund will invest in such leveraged loans that the Adviser or Sub-Adviser deems to be highly liquid with readily available prices. The Fund will invest in leveraged loans rated C or higher by an NRSRO or is unrated but considered to be of comparable quality by the Adviser or Sub-Adviser. The Fund will not invest in leveraged loans that are in default at time of purchase. The Fund will only invest in U.S. dollar-denominated leveraged loans. In addition, for investment purposes, the leveraged loan must have a par amount outstanding of U.S. \$150 million or greater at the time the loan is originally issued. The Adviser represents that the investment objective of the Fund will not be changing.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the net asset value (“NAV”) per Share is calculated daily and that the NAV and the Disclosed Portfolio is made available to all market participants at the same time. The intra-day, closing and settlement prices of the portfolio securities, including any leveraged loans held by the Fund, will also be readily available from the national securities exchanges trading such securities, automated quotation systems, published or other public sources, or on-line information services. The Portfolio Indicative Value, as defined in NYSE Arca Equities Rule 8.600 (c)(3), is disseminated by one or more major market data vendors at least every 15 seconds during the Exchange’s Core Trading Session. On each

business day, before commencement of trading in Shares in the Core Trading Session on the Exchange, the Fund discloses on its website the Disclosed Portfolio that will form the basis for the Fund's calculation of NAV at the end of the business day. Information regarding market price and trading volume of the Shares is and will be continually available on a real-time basis throughout the day on brokers' computer screens and other electronic services, and quotation and last-sale information is available via the Consolidated Tape Association high-speed line.

Trading in Shares of the Fund will be halted if the circuit breaker parameters in NYSE Arca Equities Rule 7.12 have been reached or because of market conditions or for reasons that, in the view of the Exchange, make trading in the Shares inadvisable. Trading in the Shares is subject to NYSE Arca Equities Rule 8.600(d)(2)(D), which sets forth circumstances under which Shares of the Fund may be halted. The website for the Fund includes a form of the prospectus for the Fund and additional data relating to NAV and other applicable quantitative information. In addition, as stated in the Prior Release, investors have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest. As noted in the Prior Release, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via the Intermarket Surveillance Group ("ISG") from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as stated in the Prior Notice, investors have ready access to information regarding the Fund's holdings, the Portfolio Indicative Value, the Disclosed Portfolio, and quotation and last-sale information for the Shares. As noted above, the Fund may

invest up to 20% of its net assets in only highly liquid leveraged loans with readily available prices. The Fund will invest in leveraged loans rated C or higher by an NRSRO or is unrated but considered to be of comparable quality by the Adviser or Sub-Adviser. The Fund will not invest in leveraged loans that are in default at time of purchase. The Fund will only invest in U.S. dollar-denominated leveraged loans. In addition, for investment purposes, the leveraged loan must have a par amount outstanding of U.S. \$150 million or greater at the time the loan is originally issued.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange believes that the proposed rule change, in permitting the Fund to utilize leveraged loans as part of its portfolio to achieve its investment objective, will enhance competition among issues of Managed Fund Shares that invest in leveraged loans.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and

¹⁵ 15 U.S.C. 78s(b)(3)(A).

Rule 19b-4(f)(6) thereunder.¹⁶

A proposed rule change filed under Rule 19b-4(f)(6)¹⁷ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁸ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission notes that waiver of the operative delay would permit the Fund to invest immediately in leveraged loans that the Sub-Adviser believes will further the Fund's investment objective to achieve high current income with a secondary goal of capital appreciation.

Under the proposal, the Fund's investments in leveraged loans would be limited to 20% of its net assets. The Exchange states that the Fund will not invest in leveraged loans that are in default at time of purchase and that the Fund will only invest in U.S. dollar-denominated leveraged loans. In addition, for investment purposes, each leveraged loan must have a par amount outstanding of U.S. \$150 million or greater at the time the loan is originally issued. The Commission notes that it has approved the listing and trading of shares of another exchange-traded fund that principally invests in similar leveraged loans.¹⁹ The Exchange represents that the Fund's investment objective is not changing, all other representations made in the Prior Release remain unchanged, and the Fund will continue to comply with all of the listing

¹⁶ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁷ Id.

¹⁸ 17 CFR 240.19b-4(f)(6)(iii).

¹⁹ See note 9, supra.

requirements under NYSE Arca Equities Rule 8.600. For the foregoing reasons, the Commission believes that the proposed change does not raise novel or unique regulatory issues and is consistent with the protection of investors and the public interest. Therefore, the Commission waives the 30-day operative delay requirement and designates the proposed rule change as operative upon filing.²⁰

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2013-83 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and

²⁰ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

Exchange Commission, 100 F Street, NE, Washington, DC 20549–1090.

All submissions should refer to File Number SR-NYSEArca-2013-83. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m.. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information

that you wish to make available publicly. All submissions should refer to File No. SR-NYSEArca-2013-83 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Kevin M. O'Neill,
Deputy Secretary.

[FR Doc. 2013-21535 Filed 09/04/2013 at 8:45 am; Publication Date: 09/05/2013]

²¹ 17 CFR 200.30-3(a)(12).